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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 01-129
Competition in the Market for the	)	
Delivery of Video Programming	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming. *Notice of Inquiry* in CS Docket No. 01-129, FCC 01-191 (rel. June 25, 2001) ("*Notice*"). In the *Notice*, the Commission sought comment on, *inter alia*, the role of broadcast television in the market for the delivery of video programming, and the development of new technologies and services, including interactive television, electronic program guides and Internet video. NAB's comments demonstrate the considerable extent to which consumers still depend on over-the-air broadcast television signals for the delivery of video programming. Our comments also discuss how the development of new technologies, particularly interactive television, will expand opportunities for cable gatekeepers to disadvantage providers of competing video services and content.

I. Broadcast Television Continues To Play A Vital Role In The Delivery Of Video Programming To Millions of Consumers.

The *Notice* (at ¶ 27) requested data on the role of broadcast television in the market for

[1] NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

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the delivery of video programming. In particular, the *Notice* sought information on the number of households relying on over-the-air reception for local broadcast service. The available data demonstrates that millions of U.S. consumers (particularly those with lower incomes) continue to rely on over-the-air broadcast television reception for their delivery of video programming.

According to data in the Spring 2001 Home Technology Monitor Ownership Report prepared by Statistical Research, Inc. ("Home Technology Report"), there are approximately 46.5 million television sets in broadcast-only homes.[2] An additional 34.5 million television sets in households subscribing to a multichannel video programming distributor ("MVPD") service remain unconnected to the MVPD service. Thus, a total of 81 million television sets (or approximately 30.3% of the 267 million sets in the U.S.) are not connected to any MVPD service and receive all broadcast signals over-the-air.

The Home Technology Report also estimates that 20.9% of all television households nationwide are broadcast-only homes, and over 41% of all households contain at least one broadcast-only set. Nielsen similarly estimates that 20.7 million, or 20.2% of all television households nationwide, are broadcast-only homes. Nielsen, *DMA Household Universe Estimates* (May 2001).[3] Both of these recent studies clearly demonstrate that millions of

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[2] This Report, issued twice a year by Statistical Research, Inc., is a comprehensive survey of television, telephone and computer equipment in U.S. homes. This estimate of the number of broadcast-only television sets is derived from information in the Home Technology Report and from Nielsen's estimates of the number of U.S. television households.

[3] The Commission's last report on competition in the video programming market found that nearly 84% of U.S. television households subscribed to an MVPD service, thereby implying that only 16% of households nationwide were broadcast-only homes. *See Seventh Annual Report* in CS Docket No. 00-132, FCC 01-1 at Appendix C, Table C-1 (rel. Jan. 8, 2001). This discrepancy between the Commission's findings and the data of Nielsen and Statistical Research, Inc. likely results from the FCC's methodology. To reach its 84% estimate, the Commission apparently added together all households subscribing to the various types of MVPD service, without accounting for the fact that some households subscribe to more than one MVPD service. The Commission itself noted in last year's report that the "total number of MVPD households is

consumers rely, solely or in part, upon free, over-the-air broadcast television reception for their delivery of video programming.[4]

Moreover, data from the Home Technology Report shows that households relying solely on over-the-air broadcasting are predominantly lower income. While nationwide approximately 21% of television households are broadcast-only, approximately 33% of television households with incomes under $30,000 annually are broadcast-only. In contrast, just over 10% of the households with annual incomes exceeding $75,000 depend solely on over-the-air broadcasts to receive video programming. In addition, broadcast-only households include relatively greater numbers of racial/ethnic minorities. For example, while about 18% of white television households nationwide are broadcast-only, approximately 24% of African-American and 32% of Hispanic television households rely completely on over-the-air broadcasting. Thus, it is clear that the broadcast-only households in the U.S. include a disproportionate number of viewers who would be least able to afford a subscription television service (or, indeed, any other information technology service, such as Internet access).

NAB also emphasizes that, even for television households subscribing to an MVPD service, broadcast stations remain a very significant source of local, diverse programming. Particularly in this era of increasing consolidation in the cable industry, the broadcast stations carried on cable systems continue to provide a guaranteed minimum of local and diverse voices for subscribers. As the Commission has explicitly recognized, most programming carried on any cable system is "either originated or selected by the cable system operator, who thereby

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likely to be somewhat less than the given figure since some households subscribe to the services of more than one MVPD." *Id.* at Table C-1, Note (iii).

[4] Broadcast-only television households are also less likely to have personal computers and use on-line services. For example, only 34.8% of broadcast-only homes utilize on-line/internet services, while 57.6% of MVPD households use these services.

ultimately controls the content of such programming." *Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12953 (1999). Moreover, according to the Commission, cable systems "typically do not serve as *independent* sources of local information; most of any local programming they provide is originated" by broadcast stations, which "are the dominant source of *local* news and information." *Memorandum Opinion and Second Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶ 22 (2001) (emphasis in original).[5] Given these views, it would be inappropriate for the Commission to discount the important role that broadcasters play in the provision of local, diverse programming to *all* television households, whether or not they subscribe to an MVPD service.[6]

II. The Development Of New Technologies, Particularly Interactive Television, Will Expand Opportunities For Cable Operators To Disadvantage Competitors.

In the *Notice* (at ¶¶ 43-44), the Commission inquired about, *inter alia*, the effect of the development of interactive television ("ITV") services on competition in the video marketplace and the relationship between electronic program guides ("EPGs") and ITV and other new technologies and services. As NAB discussed in previous submissions to the Commission, the development of new technologies, including ITV and EPGs, will only expand opportunities for cable system operators, who control the optimal distribution platform for digital, interactive services, to disfavor competing content and service providers.

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[5] *See also Report and Order*, 14 FCC Rcd at 12933 (noting that "diversity of viewpoints in local news presentation" is "at the heart" of the Commission's "diversity goal").

[6] Congress has expressed similar concerns about cable subscribers retaining access to local, diverse information sources. *See* H.R Rep. No. 628, 102d Cong., 2d Sess. at 56 (1992) (consumers who "rely on cable television for video services" should "not be deprived of the programs presented by their local television stations," which include local news and information); 47 U.S.C. § 532(g) (authorizing FCC to "promulgate any additional rules necessary to provide diversity of information sources," once cable systems reach a specified subscriber level).

As the Commission itself recognized, and as NAB and other commenters explained in the pending proceeding on ITV, the cable platform has "significant advantages in providing ITV services."[7] Especially because other platforms suffer from a variety of technical drawbacks that make them unsuited to delivering the full range of interactive services,[8] "cable facilities provide the optimal platform for the delivery of ITV services." *Memorandum Opinion and Order* in CS Docket No. 00-30, FCC 01-12 at ¶ 222 (rel. Jan. 22, 2001).

In addition, the delivery of digital ITV services will, unlike analog, require a mechanism for "associating" all of the elements – video, audio and data – comprising any interactive service. Beyond the market power conveyed by the absence of a truly competitive distribution platform, cable's power in the ITV marketplace will also be greatly enhanced by the ability of cable operators in the digital environment to control this "association" of the various elements of ITV services. As NAB explained in the ITV proceeding, cable operators will "associate" (or "link") all of the elements needed for digital ITV services through their creation of EPGs, which will consequently become a powerful mechanism for cable operators to favor or disfavor whatever interactive content and services they choose.[9] For these reasons, the growth of digital ITV

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[7] *Notice of Inquiry* in CS Docket No. 01-7, FCC 01-15 at ¶ 20 (rel. Jan. 18, 2001) ("*ITV Notice*"). *See* NAB Comments in CS Docket No. 01-7 at 17-19 (filed March 19, 2001) (among other advantages, the cable platform has the upstream and downstream bandwidth to provide the high-speed connection necessary for the full range of ITV services; in addition, cable passes almost all homes in the U.S. and has been the dominant distribution vehicle for multichannel video programming for some years).

[8] *See ITV Notice* at ¶¶ 19-20 (noting, *inter alia*, the lack of a satisfactory "upstream" channel for Direct Broadcast Satellite and the bandwidth constraints of Digital Subscriber Line technology).

[9] *See* NAB Comments in CS Docket No. 01-7 at 24-29 (filed March 19, 2001). *See also* NAB Reply Comments in CS Docket No. 01-7 at 7-8 (filed May 11, 2001) (explaining that, in the interactive environment, a cable operator will be able to disadvantage the programming of competitors by blocking, interfering with or degrading the ITV enhancements associated with that programming, and by discriminating in a variety of technology-related matters, including EPGs, screen displays, channel assignment and position, caching of information, and downstream and return path bandwidth and transmission speed).

services (including EPGs) will only expand opportunities for cable operators to discriminate against the offerings of unaffiliated entities and other disfavored competitors such as broadcasters, thereby adversely impacting competition in the video marketplace overall.

III. Recent Events Demonstrate The Continuing Ability Of Cable Operators To Disadvantage Competitors And Consumers In The Video Distribution Marketplace.

A number of recent developments illustrate the market power of cable system operators, and their continuing ability and incentive to discriminate against unaffiliated content and service providers, including broadcasters. For example, a number of cable system operators have taken action to restrict the amount of programming that cable programming networks can stream directly to consumers over the Internet.[10] If cable operators can force cable networks, in return for carriage of the networks' programming on cable systems, to limit the distribution of programming over the Internet, then this will significantly "impede the provision of video over the Internet," *Notice* at ¶ 42, to the detriment of both consumers and potential competitors attempting to by-pass the cable bottleneck and reach consumers directly.

NAB also observes that cable operators' attempts to use carriage agreements as vehicles to restrict the Internet streaming of video programming seem inconsistent with at least the intent, and arguably the terms, of Sections 616 and 628 of the Communications Act. Section 616(a) directs the Commission to prevent cable operators from "coercing" any programming vendor "to

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[10] For example, Charter Communications wanted to insert a clause in its carriage agreement with ESPN that would have effectively prevented ESPNews from video streaming its content on the Web. *See, e.g.,* L. Moss, *ESPN to Charter: You're Out*, Cable World at 7 (May 28, 2001); L. Rich, *Kicking and Streaming*, The Industry Standard (June 11, 2001); S. Schiesel, *Charter Removes ESPNews from Some Cable Systems in Dispute*, The New York Times, Section C, Page 2 (July 2, 2001). Other cable system operators are similarly "pushing for guarantees that programmers won't offer content over the Web." L. Moss, *Operators Back Charter in Web Dispute*, Cable World at 1 (June 4, 2001). Charter, AT&T Broadband, Time Warner Cable and Comcast have been identified as the cable system operators attempting to limit streaming by programmers the most strictly. *See* R.T. Umstead and S. Donohue, *Making Tense Times Worse, Charter Raises "Stream" Bar*, Multichannel News at 1 (June 4, 2001).

provide . . . exclusive rights against other multichannel video programming distributors as a condition of carriage on a system." 47 U.S.C. § 536(a)(2). If, "as a condition of carriage," a cable operator attempts to obtain exclusive rights to a cable network's programming so as to prevent its distribution via the Internet, then a question of compliance with the Communications Act arises.[11]

Congressional concern with efforts by cable operators to deny competing distributors access to programming directly led to passage of Section 628 of the Communications Act. This section makes it unlawful for "a cable operator" to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor" from providing certain programming "to subscribers or consumers." 47 U.S.C. § 548(b). Cable operators' current efforts to "hinder significantly or to prevent" the distribution of cable network programming to "consumers" via the Internet are entirely in keeping with the cable industry's history of using its control over programming to the disadvantage of competing distributors, and are obviously contrary to Congress' intent in passing Section 628.

The desire of cable gatekeepers to control access to consumers is also reflected in the current lack of agreements between cable operators and broadcasters for the carriage of digital television ("DTV") signals. The *Notice* (at ¶ 28) asked for information on these carriage agreements and the status of negotiations between cable systems and broadcasters for such carriage. As NAB has already reported in detail, cable operators generally will not respond to

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[11] Section 616(a) also prevents cable operators from utilizing carriage agreements "to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. § 536(a)(3). Unaffiliated cable programming networks could contend that cable operators' use of carriage agreements to restrict Internet streaming unreasonably restrains their ability to compete.

broadcaster inquiries about cable carriage of DTV signals, and only a handful of actual carriage agreements have consequently been negotiated.[12] The reluctance of cable operators to even discuss carriage of DTV signals clearly demonstrates that cable systems have "systemic reasons" for limiting the access that broadcasters and other competitors have to consumers.[13]

The continuing wave of consolidation within the cable industry generally will only tend to enhance the market power of cable operators and their ability to discriminate against unaffiliated content and service providers. For example, the bid by Comcast Corp. for AT&T Broadband, if consummated, would result in a combined company reaching 22 million subscribers nationwide, having more than 70% of all the cable customers in the top 20 markets, and playing a major role in high-speed Internet service in eight of the top 10 markets.[14] Industry observers have emphasized that the combined Comcast/AT&T "could potentially wield a heavy hand in controlling programming options."[15] Certainly the combined entity, which owns several programming networks itself, would be in an improved position to favor its affiliated programming at the expense of independent programmers. *See Communications Daily* at 4 (July 11, 2001) (principal analyst at Broadband Intelligence remarked that "If I were a programmer, I

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[12] *See* Comments of NAB/MSTV/ALTV in CS Docket Nos. 98-120, 00-96 and 00-2 at 17-26 (filed June 11, 2001) (explaining that cable has increased incentives not to carry DTV broadcasters and that cable carriage of DTV broadcasters will not happen without must carry).

[13] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 201-202 (1997) (cable systems have the incentive to disadvantage broadcast competitors "in favor of programmers . . . less likely to compete with them for audience and advertisers").

[14] C. Stern, *Cable's Long Reach*, Washington Post at H01 (July 15, 2001). Indeed, this merger would hasten the decline of competition in the area of high-speed Internet access, where "[d]uring the past year, several fledgling providers have collapsed, greatly reducing the competitive threat to telephone companies and cable operators." *Id.*

[15] T. Lemke, *Crimping Cable Competition?*, Washington Times at B7 (July 11, 2001). *See also Communications Daily* at 3 (July 11, 2001) (the "new Comcast also would gain tremendous leverage over programmers through its vastly increased size, possibly dictating carriage terms").

wouldn't be jumping up and down" about the merger "unless I were QVC" (*i.e.*, owned by Comcast)).[16] Members of the Senate Antitrust Subcommittee, moreover, recently criticized cable operators for withholding local sports and other popular programming from competitors, such as Direct Broadcast Satellite and cable overbuilders.[17] In sum, recent events only confirm that increasingly consolidated cable operators will continue to exercise their market power to the detriment of unaffiliated content and service providers and consumers alike.[18]

IV. Conclusion

As shown by the studies of Nielsen and Statistical Research, Inc., free over-the-air broadcast television continues to play a vital role in the delivery of video programming to millions of consumers. Approximately 21% of the television households in the U.S. rely completely on over-the-air broadcasting, while millions of additional households that subscribe to an MVPD service continue to receive broadcast signals over-the-air on at least one of the television sets in their homes. In addition, television households that rely solely on over-the-air broadcasting to receive video programming are more likely to be lower income and members of minority groups than households subscribing to an MVPD service.

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[16] Comcast President Brian Roberts has noted that "one of the major perks of his proposal to merge with AT&T was that it would allow Comcast to extend the reach of its own content" across a larger subscriber base. Stern, *Cable's Long Reach* at H01.

[17] *See Communications Daily* at 3 (April 5, 2001) (at this April 4th hearing on cable competition, the Subcommittee additionally criticized cable operators for raising prices much faster than general inflation rates). Many other observers have similarly noted the cable industry's price increases, particularly in markets where cable operators face no head-to-head competition from an overbuilder. *See* Stern, *Cable's Long Reach* at H01 (citing Thomas Hazlett, an economist at the American Enterprise Institute, who has reported that prices are on average 15% lower in markets where there is competition between cable and an overbuilder).

[18] Reports also indicate that cable system operators are pushing consolidation in the consumer market for EPGs and interactive program guides ("IPGs"). *See* S. Donohue and A. Grossman, *MSOs Push IPG Consolidation*, Multichannel News at 5 (June 11, 2001) (the "goal" of the four major cable system operators backing TV Gateway, an IPG consortium, "is to clean up the

Because cable system operators control the optimal distribution platform for digital, interactive services to consumers, the further development of such services will likely only enhance the ability of cable operators to disadvantage competing content and service providers, including broadcasters. As consolidation continues in the cable industry, the influence of cable operators over, in particular, the programming carried on cable systems will also expand, to the detriment of unaffiliated content providers and consumers.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jerianne Timmerman

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

David Gunzerath, Ph.D.
NAB Research and Planning

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marketplace so there are two players," TV Gateway and Gemstar). NAB doubts whether any market would serve consumers better after it has been "cleaned up" by the cable industry.